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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAUL NUNO, Defendant and Appellant.	H031980 (Santa Clara County Super. Ct. No. CC626327)

Defendant Raul Nuno appeals a judgment entered following a jury trial in which he was convicted of aggravated sexual assault of a child under 14 (Pen. Code, § 269; counts 1 & 2)[1]; and lewd and lascivious acts on a child by force, violence, duress, menace and fear (§ 288, subd. (b)(1); counts 3- 6).

On appeal, defendant asserts the trial court erred by allowing certain evidence to be introduced, specifically evidence of prior sexual conduct, and evidence regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). Defendant also argues that the trial court erred in instructing the jury. We affirm.

[1] All further statutory references are to the Penal Code, unless otherwise noted.

STATEMENT OF THE FACTS AND CASE

Defendant was charged with two counts of aggravated sexual assault of a child under 14 (§ 269), and three counts of lewd or lascivious acts on a child by force, violence, duress, menace, and fear (§ 288, subd. (b)(1)). The information also alleged defendant had a prior rape conviction (§§ 667.1, subds. (a) and (d); 667, subds. (b)-(i), 1170.12.)

A jury convicted defendant of all counts, and found the prior allegation true. Defendant was sentenced to 260 years in state prison.

The charges stem from incidents related to a single victim, D., who was born in January 1995, and was 12-years-old at the time of trial. Defendant married Cindy, D's stepfather Fernando's sister. D. considered Cindy and defendant to be her aunt and uncle.

Cindy and Fernando's parents, Manuel and Dolores, lived in a home in San Jose, and spent a great amount of time taking care of D. Manuel would pick D. up from school on a regular basis, and would look after her until Fernando could pick her up.

At the time D. reported the sexual abuse in 2006, Cindy and defendant lived in the home with Manuel and Dolores. Defendant was often home in the afternoons when D. was in the house. Although Manuel was in charge of D.'s care in the afternoons, he was blind in one eye, diabetic and suffered from bone disease that affected his ability to stand. On many occasions when Fernando would come to pick up D., Manuel would be taking a nap. Although Fernando would find defendant home in the house with D., he considered defendant a trusted family member who would not harm D.

On April 11, 2006, D. told her mother that "[defendant] is sexually harassing me." D. cried as she told her mother that defendant had touched her in a sexual way. D. was afraid to tell her mother about the abuse, but she did anyway because she did not want defendant to touch her one-year-old sister the way he had touched her. At the time, D. was worried that her mother and Cindy would be mad at her if she told about defendant.

D.'s mother told Fernando about the abuse, and he became angry. Fernando then took D. to Manuel and Dolores's house, where D. told Cindy about the abuse. Cindy called the police, and D. then told the police about the abuse. The police went to defendant's job and arrested him there. Defendant never came home.

D. reported that she was 8-years-old and in third grade the first time defendant touched her in a sexual way. Defendant would touch her almost every day after school until she was 11 and had almost finished the fifth grade. Defendant touched the skin on her chest, butt and vagina, and his hands moved when he touched D.'s vagina. Defendant also put his mouth on D.'s vagina and made D. touch his penis with her hand. Defendant made D. get on her knees and put her mouth on his penis. Defendant held her head and moved his penis back and forth in her mouth.

D. did not tell anyone about the abuse, because she was afraid each time defendant touched her. Defendant told D. not to tell anyone about the touching, and he gave her money and gifts so she would keep quiet. D. was afraid to tell her parents where the money and the gifts came from.

At one point before telling her mother, D. told her 10-year-old cousin R. about the sexual abuse. D. said "[defendant] touches me." D. made R. "pinky promise" not to tell anyone.

Prior Conduct

Evidence of defendant's prior sexual conduct with four different victims was introduced at trial. The four victims were J., S., L., and B.

Victim J.

Defendant met J. at their church. The two began a sexual relationship when defendant was 19 and J. was 14. When J. was 16-years-old, she and defendant had a daughter together. J. and defendant ended their relationship.

Victim S.

On September 30, 1995, when J. was 18-years-old and a college student, defendant came to her home to visit their daughter. J. was at work at the time. J.'s 16-year-old sister, S., was also at work, and she called home for a ride from work around 9:30 p.m. Defendant answered the phone and agreed to pick her up and drive her home. S. considered defendant like a member of the family and trusted him like a brother.

There was no one there when S. and defendant arrived at S.'s home. S. asked defendant if she could borrow money from him, and he responded by asking her to kiss flash him. Defendant offered S. $20 to lift her skirt. S. refused and walked away, but defendant followed her around the house.

S. decided to go to bed, and when she came out of the bathroom, defendant was lying on her bed. S. asked defendant to leave, but he would not, so S. went to J.'s room to sleep. Defendant followed her to J.'s room, so S. went back to her own room and went to bed.

S. woke up during the night to find defendant on top of her. Defendant had S. pinned down by the weight of his body. S. was shocked and afraid and did not call out for help. Defendant raped S., and told her not to tell anyone about it. Defendant also told S. that if J. found out, she would be made at S. When defendant left, he gave S. $100. S. did not tell anyone about the rape that night.

The following day, on October 1, 1995, J. found a note from defendant on the windshield of her car. In the note, defendant apologized for hurting J.'s family and hoped "[S.] will be okay."

Two days after the rape, S. told the bishop in her church that defendant had raped her. The bishop told S.'s family.

Defendant called J. a few times in October to talk about what happened with S. The San Jose Police Detective handling S.'s case asked J. to tape-record a conversation

with defendant. During the conversation, J. asked defendant why he did what he did. Defendant replied that he was weak and had "fall[en] into temptation."

Victim L.

Defendant met L. during a school field trip when he was 18-years-old and she was an 11-year-old sixth grader. Defendant was serving as a chaperone for his younger brother P. on the field trip. After the field trip, defendant wrote a note to L., telling her he thought she was cute, and he asked his brother P. to give L. the note. L. was very excited to have the attention of any older man, and she wrote a letter to defendant telling him she thought he was cute. The two exchanged letters through P. for a period of time. Defendant picked L. up from school a few times, and on two or three occasions, the two spent time together in L.'s home when her parents were not there. The two French-kissed in her room and the living room of her home. Defendant treated L. well and gave her a bracelet for Christmas that said "Someone Special." After defendant gave L. the bracelet, L. kissed defendant to thank him, and he put his hand on her chest to feel her heartbeat.

L. stopped seeing defendant when she learned he had another girlfriend named B., who was a classmate of L.'s in middle school.

Victim B.

Defendant began a relationship with B. when she was 13. He would drive B. to school every day, and they would French-kiss. Eventually, they began to have a sexual relationship when B. was 15-years-old. B. had a son she named Raul Jr., but defendant did not acknowledge that he was the father of the child.

Defense at Trial

Defendant denied that he ever sexually molested D., and testified on his own behalf at trial. Defendant admitted his sexual relationship with B., and J., however, he denied that he raped S., and stated that their sexual encounter was consensual. Defendant also admitted to dating L.

Defendant testified that between September 2002 and September 2003, he worked for Rosendin Electric at various job sites. His hours at the time were from 7:00 a.m. to 3:30 p.m., and depending on traffic, he would arrive home to the house in San Jose between 4:15 and 4:30 p.m. When defendant arrived home, his in-laws Dolores and Manuel were home, as well as his nieces D. and A. Defendant testified that D. was not always there when he arrived home, but that she was there around four times per week. Defendant stated that he was never in the house alone with just D. and Manuel.

In 2005, defendant left Rosendin for a job at Redwood City Electric. There was no gap in employment, and his hours remained the same. Defendant always arrived home at 4:30, after Dolores and all of her grandchildren had arrived home.

In 2006, defendant worked at Kifer Technology in Sunnyvale and did not get home until 5:30 or 6:00 p.m. each day.

Defendant testified that he never touched D. in a sexually inappropriate way, and that he was never alone with her. Defendant gave her a dollar for ice cream, and gifts for Christmas and her birthday, but not at any other time. Defendant believed D. accused him of molestation because she watched an Oprah episode about sexual harassment.

In addition to his own testimony, D. offered the testimony of Dolores and Manuel, and defendant's stepson, Ramon, all of who lived in the house in San Jose with defendant, where D. would come for childcare after school. All three witnesses testified to varying degrees that defendant was rarely, if ever alone with D. in the house, and that they did not believe that defendant molested D. In particular, Dolores testified that she did not believe D, because if it were true, D. would have told someone about the molestation. Because Dolores could not figure out how the molestation could have happened, "therefore it [did not] happen." In addition, Dolores testified that she was certain defendant was never home on a weekday afternoon for any reason between 2003 and 2005. Finally, Manuel testified that he never left D.'s side for a moment when he babysat her after school.

Both defendant's sister, and a co-worker testified on defendant's behalf at trial. They both stated that despite defendant's history of having sex with underage girls, and his rape conviction, they did not believe he was the kind of person who would molest D.

DISCUSSION

On appeal, defendant asserts the trial court erred by allowing the introduction of evidence of his prior sexual conduct under Evidence Code section 1108, and evidence regarding CSAAS. Defendant also argues that the trial court erred in instructing the jury regarding unanimity, witness credibility and adoptive admissions.

Admission of Defendant's Prior Sex Offenses

During trial, the prosecution introduced evidence of defendant's prior sex offenses to prove propensity to commit the charged crime in the present case. Specifically, the court allowed evidence of the following offenses: (1) rape of S. in violation of Penal Code section 261, subdivision (a)(2); (2) unlawful sexual intercourse with a minor, J., in violation of Penal Code section 261.5; (3) unlawful sexual intercourse with a minor, B., in violation of Penal Code section 261.5, subdivision (c); (4) oral copulation with a minor, B., in violation of Penal Code section 288a, subdivision (b)(1); and (5) annoyance of a child, B., in violation of Penal Code section 647.6. The court also admitted uncharged sexual conduct with L.

The evidence was admitted pursuant to Evidence Code section 1108, which provides, in relevant part, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Thus, under section 1108, evidence of uncharged sexual offenses may be admitted to show that the defendant had a propensity to commit such crimes. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.)

Constitutionality of Evidence Code section 1108

Defendant asserts on appeal that admission of the prior conduct pursuant to Evidence Codes section 1108 violated his federal due process rights to a fair trial.

The California Supreme Court addressed the constitutionality of Evidence Code section 1108 in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*). The court noted in its analysis that " '[o]ur elected Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature has determined the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.' " (*Id.* at p. 911.) Moreover, evidence of other sex crimes is relevant to the issue of the defendant's " 'disposition or propensity to commit these offenses.' " (*Id*. at p. 915; *People v. Reliford, supra*, 29 Cal.4th at p. 1012.)

The *Falsetta* court concluded that section 1108 did not offend due process, for several reasons. One reason is that the admission of propensity evidence under the statute is limited to cases involving current sex offenses and to evidence of prior sex offenses and thus serves to prevent "far-ranging attacks on the defendant's character." (*Falsetta, supra,* 21 Cal.4th at p. 916.) Another reason is that judicial efficiency is not negatively impacted because the statute expressly authorizes the trial court to exclude evidence, pursuant to section 352, where its probative value is outweighed by the probability that admission of the evidence will, among other things, necessitate undue consumption of time. (*Falsetta*, *supra*, 21 Cal.4th at p. 916.)

Finally, the *Falsetta* court explained that section 1108 did not offend due process because, "[b]y reason of section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the

degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at pp. 916-917.)

While the United States Supreme Court has not yet weighed in on section 1108's constitutionality, under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we are bound by the ruling of our Supreme Court in *Falsetta*. We therefore find that the statute does not violate due process in this case.

Discretion in Admitting Prior Conduct Under Evidence Code Section 1108

Defendant argues in the alternative that in the event we find the statute constitutional, the trial court abused its discretion in admitting the prior conduct.

As noted above, the trial court has broad discretion to exclude evidence of prior sex offenses under section 1108 where the probative value of the evidence is outweighed by its prejudicial effect. (*Falsetta, supra,* 21 Cal.4th at p. 919.) Accordingly, the standard of review for an order admitting such evidence is abuse of discretion. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

"By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility

determinations." (*Falsetta, supra*, 21 Cal.4th at p. 915.) Consequently, section 1108 permits the trier of fact to consider prior, uncharged sexual offenses " ' "as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense." ' " (*Falsetta, supra*,21 Cal.4th at p. 912.) "With the enactment of section 1108, the Legislature 'declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the [complaining] witness.' " (*People v. Soto* (1998) 64 Cal.App.4th 966, 983.) Indeed, "the reason for excluding evidence of prior sexual offenses in such cases is not because that evidence lacks probative value; rather, it is because ' "it has too much." ' " (*People v. Branch* (2001) 91 Cal.App.4th 274, 283.)

As explained above, when considering the admission of evidence of uncharged sexual offenses pursuant to section 1108, the trial court must engage in a careful weighing process under section 352, taking into account a variety of factors, all of which fall within one of two categories of effects factors. (*Falsetta, supra*, 21 Cal.4th at p. 917.)

One category consists of the evidence's probative value, i.e., the tendency of the evidence to show that the defendant possessed a proclivity to engage in conduct of the same type as that involved in the charged offense, thus supporting an inference that he did in fact engage in the conduct alleged in the information. The other category consists of its prejudicial value, i.e., the tendency of evidence of wrongdoing to generate a sense of antagonism toward the defendant, ranging from distaste to indignation to outrage to shock, which in and of itself inclines the jury to convict the defendant regardless of whether the actual charges are borne out by the evidence.

The California Supreme Court has "recognized that, when ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even

expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213.) Additionally, "[n]othing in *Falsetta* indicates the Supreme Court intended either to reverse this well-established precedent on the proper standards for section 352 analysis, or to require a trial court to articulate its consideration of each of a list of particular factors of probability and prejudice in making a decision under section 352." (*People v. Jennings, supra,* 81 Cal.App.4th at p. 1315.)

Here, defendant rests his argument on the idea that while the prior offenses all involved sexual contact with underage females, the victims were all relatively close to defendant's age at time. The present offenses, however, occurred between a 30-year-old man and an 8-year-old girl. According to defendant, there is a "world of difference" between the prior conduct and the current offenses because of the significant age differences. Therefore, defendant asserts, the prior conduct lacked probative value to demonstrate propensity to commit the current crime of molestation.

Defendant' argument lacks merit. Here, the trial court fulfilled its responsibilities under section 352 to weigh the probative value of the prior sex offense evidence against its prejudicial effect. It is apparent from the record that the trial court considered the reliability and probative value of the proffered charged and uncharged sex offense evidence against its obviously prejudicial effect before determining that the evidence was admissible. Defendant has not shown that the trial court exercised its discretion in "an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez, supra*, 20 Cal.4th 9-10.)

For these reasons, we conclude that the trial court did not abuse its discretion in admitting the evidence of defendant's sex offenses under section 1108.

Admission of Expert Testimony Regarding CSAAS

Defendant asserts the trial court erred in admitting expert testimony regarding CSAAS, because during voir dire, the jury did not demonstrate it had any misconceptions about sexually abused children.

Before trial, defendant filed a motion in limine seeking exclusion of Lewis's testimony regarding CSAAS. Defense counsel contended that CSAAS evidence should be excluded on Evidence Code section 352 grounds and because it does not meet the requirements of the *Kelly-Frye* test. (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013.)

On appeal, defendant argues the trial court erred in denying the motion and admitting the evidence.

While it is true that CSAAS evidence is not admissible to establish that the victim in a particular case was in fact molested, it is well established that CSAAS "evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 (*Bowker*).) Our Supreme Court has acknowledged that this type of evidence, if offered for this purpose, is admissible. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1088 [evidence of battered women's syndrome]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301 [evidence regarding parental reluctance to report child molestation].)

The necessity for such evidence arises when the victim's credibility is attacked by a defendant's suggestion that the victim's conduct after the incident, e.g., a delay in reporting, is inconsistent with his or her testimony claiming molestation. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383.) "[A]t a minimum the [CSAAS] evidence must be targeted to a specific 'myth' or 'misconception' suggested by the evidence. [Citation.] For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed

reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust. Where an alleged victim recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child who is seeking to remove himself or herself from the pressure created by police investigations and subsequent court proceedings. In the typical criminal case, however, it is the People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony." (*Bowker, supra,* 203 Cal.App.3d at pp. 393-394.)

However, "[i]dentifying a 'myth' or 'misconception' has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.)

Even when it appears that CSAAS evidence may be admissible, use of the evidence is subject to certain procedural safeguards. To guard against the danger that a jury might improperly evaluate CSAAS evidence and view it as proof of a defendant's guilt, the jury must be instructed that "the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Bowker, supra*, 203 Cal.App.3d at p. 394.) Jurors "must understand that CSAAS research approaches the issue from a perspective opposite to that of the jury. CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to the experience." (*Ibid*.) If a trial court adheres to these procedural safeguards, testimony regarding CSAAS is admissible for the limited purpose described. (*Id*. at pp. 393-394.)

Contrary to defendant's assertion, CSAAS evidence was not offered in this case to establish that he molested D., but in order to assist the jury in understanding how her

actions were not "inconsistent with having been molested." (*Bowker*, *supra*, 203 Cal.App.3d at p. 394.) According to D.'s trial testimony, she did not immediately report the acts of molest and in fact, kept them secret from adults for several years. When D. told her 10-year-old cousin about the abuse, she made her promise not to tell anyone.

In addition, on cross-examination, defense counsel challenged D.'s credibility by questioning the very accommodations the CSAAS testimony was elicited to explain. For example, defense counsel suggested through cross-examination if the molestations as D. testified they did, they could not have been kept secret. Defense counsel also challenged D.'s helplessness, and implied D.'s delay in reporting the abuse was because she was seeking money.

Consequently, the predicate for Lewis's testimony regarding CSAAS was the evidence of D.'s secrecy, helplessness, and delayed and conflicted reporting, which evidence defense counsel not only elicited on cross-examination, but highlighted during closing argument.

The trial court also properly instructed the jury on the reason for admitting the CSAAS testimony, stating that the testimony was "not evidence that [defendant] committed any of the charged crimes against him." The jurors were further instructed that that they could "consider this evidence only in deciding whether or not [D.'s] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." These instructions satisfy the stricture set forth in *Bowker*, *supra*, 203 Cal.App.3d at page 394.

Accordingly, we find no abuse of discretion in admitting the CSAAS evidence and further find that the jury was properly instructed on how to evaluate that evidence. However, even if it was the CSAAS evidence should have been excluded in this case, it is not reasonably probable that the jury would have reached a different result. We will not set aside a judgment because of the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (Evid. Code, § 353.) The erroneous admission of

evidence is tested under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. Under the *Watson* standard, the erroneous admission of evidence warrants reversal of a conviction only if we conclude that it is reasonably probable the jury would have reached a different result had the evidence been excluded. (*People v. Scheid* (1997) 16 Cal.4th 1, 21.)

D.'s testimony itself was substantial evidence of the acts of molestation with which defendant was charged. The possibility that the jurors might have viewed Lewis's testimony as corroboration of D.'s testimony, rather than explanation, was not that great given that the jury was instructed to consider the CSAAS evidence for the limited purpose of showing that D.'s reactions were not inconsistent with her having been molested. After reviewing the entire record, we are convinced that the jury was not confused by, or improperly convinced of, D.'s credibility based upon Lewis's testimony.

Admission of Generic Testimony of Sexual Abuse

Defendant asserts the admission of propensity evidence, expert testimony regarding CSAAS, and D.'s generic testimony of sexual abuse deprived him of his due process rights to present a defense. Specifically, defendant asserts the combination of this evidence rendered his alibi defense a "practical impossibility."

In *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*), the California Supreme Court considered the due process implications of " 'generic' " testimony by minor victims about repeated occasions of molestation. (*Id.* at p. 299.) The court identified the competing concerns as follows. "Child molestation cases frequently involve difficult, even paradoxical, proof problems. A young victim such as Sammy, assertedly molested over a substantial period by a parent or other adult residing in his home, may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents. (Indeed, even a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance. See *People v. Luna* (1988) 204 Cal.App.3d 726,

748 . . . .) Accordingly, any constitutional principles or evidentiary standards we develop should attempt to assure that the resident child molester is not immunized from substantial criminal liability merely because he has repeatedly molested his victim over an extended period of time." (*Id.* at p. 305.)

Jones also concluded that generic testimony does not deprive "the defendant of a due process right to defend the charges against him." (*Jones, supra*, 51 Cal.3d at p. 321.) An alibi defense is unlikely to succeed when "the defendant has lived with the victim for an extensive, uninterrupted period and therefore had continuous access to the victim." (*Id.* at p. 319.) Credibility is usually the key issue. An alibi applicable to some of the times may undermine the victim's credibility. (*Ibid.*)

Regarding the sufficiency of the evidence, *Jones* concluded: "The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Jones, supra*, 51 Cal.3d 294, 316; emphasis in original.)

Here, D.'s testimony regarding the sexual abuse, although generic, was sufficiently specific to satisfy the requirements set forth in *Jones, supra*, 51 Cal.3d 294. D. was specific as to "the kind of act or acts committed," in that she stated that defendant touched her butt and vagina, put his mouth on her vagina, made her put her mouth and

her hand on his penis. D. was also specific "the number of acts committed," in that she stated that defendant touched her more than one time on more than one day, and although she told him she did not like it, it happened again and again. Finally, D. described "the general time period in which these acts occurred," when she testified that the abuse began when she was 8-years-old and in third grade, and continued until she was 11 and almost done with fifth grade.

Based upon the nature of D.'s testimony in this case, we find the trial court's admission of the generic testimony did not deprive defendant of his due process rights to present a defense.

Instructional Error

Defendant asserts the trial court erred in instructing the jury on unanimity pursuant to CALCRIM No. 3500, instructing the jury with CALJIC No. 2.27 and CALCRIM No. 1190 in unison, and in instructing on adoptive admissions.

Unanimity Instruction

Defendant argues the trial court erred in instructing the jury on unanimity. Specifically, the court instructed the jury with CALCRIM No. 3500 as follows: "The defendant is charged in Counts One through Six of the Information with crimes alleged to have occurred sometime during the period of January 14, 2003 to April 11, 2006. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." Defendant asserts the instruction as given in this case created a reasonable likelihood the jurors would not have understood that the unanimity requirement applied to each count charged.

In reviewing a claim of instructional error, we must "consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of context of the charge and entire trial record." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

We must further determine whether there is a " 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of the trial, and the arguments of counsel." (*Ibid*.)

As a general rule, based on a defendant's right to a unanimous verdict under article I, section 16, of the California Constitution, the jurors must unanimously agree that the defendant committed the same specific acts constituting the charged offenses. (*People v. Crow* (1994) 28 Cal.App.4th 440, 445, citing *Jones, supra,* 51 Cal.3d 294, 321.) According to this principle, if the prosecution presents evidence of more than one unlawful act in support of a particular charge, "either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

Here, the court did provide a unanimity instruction. Defendant argues the instruction was misleading, however, because its wording implied that "once unanimity was reached on at least one act, [the jury] need only further agree that the other charged crimes were committed in order to convict and did not have to unanimously agree upon the specific act constituting the charged crime."

Defendant's argument lacks merit particularly when the instructions are considered as a whole, as we are charged to do. In addition to CALCRIM No. 3500, the instruction defendant challenges on appeal, the trial court provided additional instructions that clarified the unanimity requirement. Specifically, the court instructed with CALCRIM No. 3515: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." The court further instructed with CALCRIM No. 3550: "Your verdict on each count and any special findings must be unanimous. This means that, to return a verdict, all of you must

agree to it. [¶] . . . [¶] You will be given verdict forms. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict forms and notify the bailiff. If you are able to reach a unanimous decision on only one or only some of the charges, fill in that or those verdict from only and notify the bailiff. Return any unsigned verdict form." Based on the combination of the unanimity instruction in CALCRIM No. 3500, as well as CALCRIM Nos. 3515 and 3550, we find the jury was properly instructed that all 12 jurors were required to decide each count separately and agree to each verdict.

Moreover, any error in instructing the jury on unanimity would be harmless even beyond a reasonable doubt. (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1448-1449.) Based on D's testimony and allegations contained in the information, the jury would not have been confused as to the nature of the acts, the number of times the acts occurred, and the general time frame involved. (*Id.* at page 1449.) Here, D. described a series of acts that occurred over a specific period of time. The nature of the evidence presented the jury with a choice of whether D's testimony adequately established that the acts were committed in the number and manner described or whether D. fabricated the allegations. The guilty verdicts as to all the charged crimes demonstrate the jury rejected defendant's sole defense that he did not engage in any sexual misconduct. As stated in *Jones*, "credibility is usually the 'true issue' in these cases, 'the jury either will believe the child's testimony that the consistent repetitive pattern of acts occurred or disbelieve it." (*Jones, supra,* 51 Cal.3d at p. 322.) In this case, the jury believed the victim's testimony about the events, and discredited defendant's denials. Based on the jury verdicts, the record does not reveal any possibility that that the jury did not agree unanimously that defendant subjected D. to various acts of sexual abuse.

CALJIC No. 2.27 and CALCRIM No. 1190 Given in Unison

Defendant asserts the trial court erred in giving CALJIC No. 2.27 and CALCRIM No. 1190 in unison, because the combination elevated D.'s trustworthiness above all other witnesses at the trial.

The instructions given in this case were as follows. CALJIC No. 2.27 provides: "You should give the testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, is sufficient for the proof of that fact. You should carefully review all evidence upon which the proof of that fact depends." CALCRIM No. 1190 provides: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness."

Defendant does not argue the instructions are incorrect statements of the law; rather, he asserts the giving of the instructions back-to-back, as occurred in the present case, created a risk the jury would elevate the complaining witness' credibility.

Defendant acknowledges that in *People v. Gammage* (1992) 2 Cal.4th 693, the California Supreme Court stated that both CALJIC No. 2.27 and No. 10.60 (the predecessor to CALCRIM No. 1190), "considered separately, correctly state the law. 'In California conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix.' [Citation.]" (*People v. Gammage, supra,* 2 Cal.4th at p. 700.) The court rejected the defendant's claim that CALJIC No. 10.60 creates a preferential credibility standard for the complaining witness that, in effect, dilutes the prosecution's burden to prove guilt beyond a reasonable doubt. (*People v. Gammage, supra,* 2 Cal.4th at pp. 700-701; see *People v. Akey* (1912) 163 Cal. 54, 56 ["There was no singling out of the testimony of the prosecuting witness with a view of giving it undue prominence before the jury"].) The court stated that despite some overlap, "CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC

No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes." (*People v. Gammage*, *supra*, 2 Cal.4th at pp. 700-701, original italics.) Thus, "one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other." (*Id*. at p. 701.) Thus, "[t]he instructions in combination are no less correct, and no less fair to both sides, than either is individually." (*Ibid*.)

The *Gammage* court further explained that "[t]he jury is instructed that the prosecution must prove its case beyond a reasonable doubt. This places a heavy burden of persuasion on a complaining witness whose testimony is uncorroborated. CALJIC No. 10.60 does not affect this instruction but . . . when all the instructions are given, 'a balance is struck which protects the rights of both the defendant and the complaining witness.' " (*People v. Gammage*, *supra*, 2 Cal.4th at p. 701.)

Defendant asserts *Gammage* does not apply if the instructions are given in unison, as they were in the present case. It is the unison of the instructions, according to defendant, that created the likelihood that the jury would elevate the victim's credibility.

We reject defendant's view of the applicability of *Gammage* to the present case. In determining the impact of instructions, we do not consider them in isolation; rather, we view it along with all the instructions and ask whether there is a reasonable likelihood that the jurors would misunderstand the challenged language in a way that was prejudicial. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) When viewed in this context, the instructions given in unison were accurate statements of the law, and did not elevate the victim's credibility over all other witnesses in the case.

Adoptive Admissions

At trial, the prosecution relied on defendant's adoptive admissions as evidence that he raped S. Specifically, the prosecution introduced two apology notes defendant wrote

about the rape, and statements he made in a telephone conversation with J. in which he admitted he "did what he did," because he fell into temptation. As a result, defendant asserts the trial court should have instructed the jury that they needed to find independent evidence of the rape before they could rely on defendant's extra-judicial admissions.[2]

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169; see also *People v. Ochoa* (1998) 19 Cal.4th 353.) The purpose of the rule is to assure that the accused is not admitting to a crime that never occurred. (*People v. Ochoa, supra,* 19 Cal. 4th at p. 405.)

While the corpus delicti rule is well-settled, the question of whether the rule applies to prior crimes evidence admitted for something *other* than to prove the crime actually occurred, such as motive, opportunity, identity or intent has not been determined. Respondent argues that the corpus delicti rule does not apply here, citing *People v. Denis* (1990) 224 Cal.App.3d 563, 568-570, in which the court held that "[t]he corpus delicti rule has never been used to exclude evidence of prior crimes when offered not to prove that [the] defendant committed them but rather solely for the limited purpose of showing [the] defendant's state of mind at the time of the charged offense." (*Id.* at p. 569.)

However, the rationale of *Denis* may be distinguishable in the present case. Here, evidence that defendant raped S. was not introduced solely to prove defendant's intent

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[2] CALCRIM No. 359 is the instruction related to corpus delicti, and reads, in relevant part: "The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict (him/her) if you conclude that other evidence shows that the charged crime [or lesser included offense] was committed."

under Evidence Code section 1101, subdivision (b), but also to prove defendant's disposition to commit sexual offenses under Evidence Code section 1108. The court in *Denis* only addressed the applicability of the corpus delicti rule to evidence admitted under Evidence Code section 1101, subdivision (b), not Evidence Code section 1108.

In any event, we need not determine here whether the holding of *Denis* should extend to prior crimes admitted under Evidence Code section 1108. In the present case, there was sufficient corroboration, in the form of S.'s testimony, to satisfy the corpus delicti rule for the rape. As a result, we find on error in the lack of an instruction on corpus delicti.

Cumulative Error

Finally, defendant claims that the errors in the instant case, taken cumulatively, prevented a fundamentally fair trial on all counts. The California Supreme Court has instructed that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Since we have determined that the trial court did not err in the particulars that defendant has presented in this court, his final claim fails as well.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.